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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 559

HANS PETE MORTENSEN and LORRAINE MORTENSEN,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

AMENDED AND SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Law Brief—OMAHA LINO-SLUG CO.—413 So. 18th St.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINION SOUGHT TO BE REVIEWED

Your petitioners, Hans Pete Mortensen and Lorraine Mortensen, and each of them, respectfully pray that a Writ of Certiorari issue to review a decision of the Circuit Court of Appeals for the Eighth Circuit, rendered

on November 23rd, 1943, at St. Louis, Missouri (R. 79 to 84, incl.), and affirming the conviction, by a divided Court, of your petitioners in the United States District Court for the District of Nebraska, Grand Island, Nebraska, Division, Honorable James A. Donohoe, United States District Judge, presiding.

—o—o—

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED

These petitioners were indicted in the District Court, as aforesaid, on an indictment returned on January 28th, 1941, containing two counts of which Count 1 (R. 1 and 2) charged that the defendants on September 4th, 1943, did unlawfully, wilfully, knowingly and feloniously transport and cause to be transported, and aid and assist in obtaining transportation for, and in transporting, in interstate commerce, from Salt Lake City, Utah, to Grand Island, Nebraska, a certain named woman, for the purpose of prostitution and debauchery and with the intent and purpose to induce, entice and compel said woman to give herself up to debauchery and to engage in immoral practices; and Count 2 (R. 2) charged them with an exactly similar offense, except that a different woman was named as the person so transported.

The petitioners filed a Plea in Abatement and Motion to Quash the Indictment (R. 3 to 6, incl., and R. 9); filed a written offer to prove certain facts (R. 7 and 8). The respondent demurred to these pleadings (R. 6 and 7), which demurrer was overruled (R. 11 and 12) and the Government was given leave to and did file an answer thereto in which was incorporated a demurrer (R. 10) and after hearings thereon these pleadings were over-

ruled (R. 11), exceptions were taken thereto and allowed by the Court (R. 11).

The indictment was assailed by these pleadings on the grounds that same did not plead facts but pleaded conclusions, was duplicitous, inconsistent, vague, indefinite and uncertain, and was not sufficiently informative so as to satisfy the requirements of the 5th and 6th Amendments to the United States Constitution, by according them due process of law and by advising the petitioners of the nature and cause of the accusations made against them, and because each count of the Indictment embraced divers ways, means and manners in which White Slavery could be committed under the law, all of said ways, means and manners being connected up by the pleader by substituting the conjunctive "and" for the disjunctive "or," used in the statute.

It was the contention of the petitioners, as disclosed by the foregoing pleadings and admitted by the Demurrers of the respondent, that the facts relating to interstate transportation did not bring this case within the purview of Sections 397 and 398 of 18 U. S. C. A., the Anti-White Slave Traffic Act, because the actual transportation of these two women was from a point in the State of Nebraska, to-wit, Grand Island, to the same point in the State of Nebraska, and that the transportation of the petitioners and these two women through other states was for the purpose and intention of taking a circle vacation tour, or trip, and it was not the intentional transportation denounced by the law, and that the respondent in order to make a case on paper had selected Salt Lake City, Utah, as the starting point of the transportation, which city was merely one of the cities which the parties

had passed through on the circle vacation trip on their way back home.

In line with their theory of the case counsel for the petitioners requested and the Trial Court refused to give the following instruction, to which refusal an exception was taken and allowed by the Court (R. 14):

> "If you find from the evidence that the vacation trip in question commenced at Grand Island, Nebraska, and that the final destination was Grand Island, Nebraska, and the states of Colorado, Wyoming and Utah were incidently gone through, you are instructed that the White Slave Traffic Act specifically provides that the words 'interstate commerce' as used in the Act shall include transportation from one state to another state. This definition necessarily excludes by implication transportation from one point in a state to the same point within the same state, and if you so find, then you shall bring in a verdict of not guilty as to both defendants on each count of the indictment."

Thereafter pleas of not guilty were entered (R. 11 and 12), a trial was had (R. 11 and 12), and after all of the evidence had been submitted a written Motion to Dismiss was filed (R. 23 to 25, incl.), same was overruled, and upon argument and submission, the jury returned a verdict of guilty on both counts (R. 13), and each of said parties received a sentence of 3 years imprisonment on each of the two counts of the Indictment, said sentences to run concurrently, and Hans Pete Mortensen was also sentenced to pay a fine of $500.00 on each of said two counts (R. 14 to 16).

Later a Motion for a New Trial was filed and overruled (R. 16 to 22, incl.), Notices of Appeals were filed

(R. 30, 31), Bail and Cost Bonds were posted (R. 26 to 30, incl.).

Thereafter, pursuant to the provisions of Rule 7 of the Rules of Procedure in Criminal Cases promulgated by the Supreme Court, the Clerk notified the Trial Judge of the filing of the Notices of Appeal (R. 45), but the Trial Judge did not *at once* notify the respective attorneys to appear before him, so as to give directions to counsel with respect to making up the record on appeal (R. 45, 46), and said attorneys were never notified pursuant to the provisions of Rule 7 so to do until 2 days after the statutory 30-day period had expired (R. 32, 33), and then the Trial Court denies the petitioners the right to a Bill of Exceptions (R. 42, 43, 50, 51), but permitted an appeal to be taken on the Transcript alone, pursuant to Rule 8 of the Rules promulgated by the Supreme Court (R. 43, 44).

Thereafter application was made to the Circuit Court of Appeals for the Eighth Circuit to allow petitioners a Bill of Exceptions, and both a showing and counter showing was made, and after arguments of counsel were had the petitioners were again denied a Bill of Exceptions (R. 50 to 77, incl.).

In petitioners' brief filed in the Circuit Court of Appeals the matter of the denial of a Bill of Exceptions to them was again urged as error and this matter was argued to the Court, but same was to no avail (Opinion footnote, R. 81).

A reading of this footnote to the majority opinion of the Circuit Court of Appeals (R. 41) discloses a very unusual way of handling and considering this question. The

record was unofficially read, judgment was passed thereon, and no opportunity was afforded these petitioners to have a review by this Court of this unofficial finding.

BASIS OF JURISDICTION

The jurisdiction of this Court is invoked:

(a) Under that part of the 5th Amendment to the United States Constitution which in so far as applicable provides "that no person shall * * * be deprived of * * * liberty * * * without due process of law."

(b) Under that part of the 6th Amendment to the United States Constitution which in so far as applicable provides "that in all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation" made against them.

(c)) Because this is a prosecution under the laws of the United States, to-wit, Sections 397 and 398 of 18 U. S. C. A., known as the Anti-White Slave Traffic Act, and involves a Judicial Construction of the scope, intent and meaning of these Statutes of the United States, and the jurisdiction over the alleged offenses is grounded upon knowingly transporting, causing to be transported, or aiding and assisting in obtaining transportation for, or in transporting a woman or girl, in interstate commerce, for the purpose of prostitution or debauchery, and the ultimate question presented and to be determined is whether or not a harmless and laudable circle vacation trip of a man and wife and two prostitutes, beginning and ending at the same place in a State, but passing through other States enroute, is denounced by these

Statutes and amounts to a violation of these Statutes, if prostitution for gain occurred in petitioner's hotel between these women and men other than the defendant, both before and after the circle vacation trip was made.

(d) Because in passing upon the question presented by Subsection (e), infra, there is a direct conflict in the opinion in case of *U. S. vs. Wilson*, 266 Fed. 712, a District Court decision from the 6th Circuit, and the opinions in *Burgess vs. U. S.* (App. D. C.), 294 F. 1002; *Corbett vs. U. S.*, 299 F. 27, 9th C. C. A., and *U. S. vs. Winkler* (D. C., W. D., Tex.), 299 F. 834, and the instant case.

(e) Under the provisions of the 5th Amendment to the Constitution of the United States relating to due process of law, the failure and refusal of the Trial Court to give an instruction covering the defendants' theory of the case as shown by their evidence amounts to a denial of a constitutional right.

(f) Because the denial of a Bill of Exceptions to petitioners by the Trial Judge, and the Circuit Court of Appeals is in direct conflict with the provisions of Rule 7 of the Rules promulgated by the Supreme Court of the United States relating to appeals in criminal cases from the District Court to the Circuit Court of Appeals, and is also in direct conflict with the decisions in *Boynken vs. Huff*, 121 Fed. (2d) 865, decided by the United States Circuit Court of Appeals for the District of Columbia, and *Ray vs. U. S.*, 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976, and *Forte vs. U. S.*, 302 U. S. 223, 58 S. Ct. 180, 82 L. ed. 209.

(g) Under Section 240 of the Judicial Code, as amended by the Act of February 13th, 1925, C. 229, Sec-

tion 1, 43 Stat. 938, now Section (a) 347, Title 28, U. S. C. A.

The judgment to be reviewed, as aforestated, is the judgment of the Circuit Court of Appeals for the 8th Circuit entered on November 23rd, 1943 (R. 79 to 83, incl.), and the 30-day period allowed to apply for this writ, exclusive of Sundays and holidays, expires December 30th, 1943.

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QUESTIONS PRESENTED

(a) Does an Indictment whose allegations are not only in the language of the Statute, but which embraces in each count thereof, by use of the conjunctive "and," divers ways, means and manners in which an offense may be committed under the Statute, some of which are inconsistent with others, satisfy the constitutional requirements under that part of Article 5 of the Amendments to the United States Constitution relating to due process of law, and that part of the 6th Amendment to the United States Constitution relating to the right of an accused to be informed of the nature and cause of the accusation made against him, and is such an indictment in each of its counts vulnerable to the claim that it pleads conclusions instead of facts and is vague, indefinite and uncertain and duplicitous?

(b) Do Sections 397 and 398, Title 18, of the United States Anti-White Slave Law, as follows—

> "397. WHITE-SLAVE TRAFFIC; TERMS DEFINED. The term 'interstate commerce,' as used in this section and sections 398 to 404 of this title, shall include transportation *from* any State or Ter-

ritory or the District of Columbia to any other State or Territory or the District of Columbia."

"398. TRANSPORTATION OF WOMAN OR GIRL FOR IMMORAL PURPOSES. * * * Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate commerce, * * *, any woman or girl for the purpose of prostitution or debauchery, * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the Court."

define and denounce as an offense against the United States a state of facts where persons take prostitutes employed in their hotel on a circle vacation trip and incidently on said trip going and coming home pass through several states, and can the Government ignore the real starting point of the transportation and of its own accord select a starting point of their own choosing, which was the place where the parties started back on their homeward journey?

(c) Can the real intent to take these prostitutes on a vacation trip be ignored and another intent be conjured up by the law enforcing authorities, because of the fact that prostitution occurred both before and after the circle vacation trip was taken?

(d) Is it proper for a Trial Judge in a District Court of the United States to refuse to give, upon the request of the defendants, an instruction to the trial jury covering their theory of the case?

(e) Can defendants, who seek to appeal from their conviction in the District Court of the United States, be

deprived of a Bill of Exceptions on said appeal because of the failure of the Trial Judge to comply with the mandatory provisions of Rule 7 of the Rules promulgated by the Supreme Court of the United States for such appeals in criminal cases, from the District Court of the United States to the Circuit Court of Appeals of the United States, which rule is as follows:

> "'The Clerk of the trial Court shall *immediately* notify the trial judge of the filing of the Notice of Appeal, and *thereupon* the trial judge *shall* at *once* direct the appellant or his attorney and the United States Attorney, to appear before him *and shall give such directions* as may be appropriate with respect to the preparation of the record on appeal including direction for the purpose of making promptly available all necessary transcripts of testimony and proceedings.'"

(f) Is it an abuse of discretion on the part of a Trial Judge of the United States District Court and of the Circuit Court of Appeals to deny appellants a Bill of Exceptions when the failure to procure one was due to the fact that the Trial Judge, although setting the place for the meeting of counsel for the purpose of giving directions relating to the making up of a Bill of Exceptions, did not "at once" set the date of said meeting, but delayed setting the date until 2 days after the statutory 30-day period had expired?

(g) Under Rule 4 of the Rules promulgated by the Supreme Court of the United States in reference to criminal appeals from the District Court to the Circuit Court of Appeals, it is provided:

> "'From the time of the filing with its Clerk of the Duplicate notice of appeal, the Appellate Court shall, subject to these rules, have supervision and con-

trol of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.' "

Is it not the duty of the Circuit Court of Appeals under that portion of Rule 4 to permit a Bill of Exceptions in a case such as the instant case?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The discretionary power of this Court to grant a writ of certiorari is invoked on the following grounds:

First. Because the decision of the Court below that the indictment in its two counts, and each of them, was legally sufficient is contrary to the letter and the spirit of the 5th Amendment to the United States Constitution relating to due process of law, and contrary to the 6th Amendment relating to the right of defendants to be informed of the nature and cause of the accusations made against them, and in theory in conflict with the decision of this Court in the case of *United States of America vs. Morris Behrman*, 258 U. S. 280, 66 L. ed. 619.

Second. Because the holding of the Court below, in the majority opinion, that the transportation in the instant case was such interstate transportation as is defined and denounced by Sections 397 and 398 of 18 U. S. C. A., is erroneous and contrary to the law.

Third. Because the holding of the Court below, in the majority opinion, that the circle vacation trip could be split up into two transportations, innocent when outward bound but criminal when homeward bound, defies both reason and the law.

Fourth. Because the holding of the Court below, in the majority opinion, that the actual starting point of the trip and the real intent involved when the trip was commenced can be ignored entirely, and another arbitrary and artificial starting point and intent can be conjured up is contrary to law, because the actions and intent of the accused is the determining factor, and not what some Government officer or agent might conjure up in his mind, in order to put a case on paper and prove it.

Fifth. Because the Court below, in the majority opinion, erred in holding that no error was committed by the Trial Court in refusing to give the aforementioned requested instruction, which covered the defendants' theory of the case, in regard to the question as to where the transportaiton commenced and ended and the intent involved in same.

Sixth. Because there is a direct conflict in the opinion in the case of *U. S. vs. Wilson*, 266 Fed. 712, decided by District Judge Edward T. Sanford on June 3rd, 1920, sitting in the United States District Court for the Eastern District of Tennessee, which is in the 6th Circuit, and the opinion in the instant case as well as the opinions in the cases of *Burgess vs. U. S.*, App. D. C., 294 F. 1002; *Corbett vs. U. S.*, 9 Cir., 299 F. 27, and *U. S. vs. Winkler*, D. C., W. D., Tex., 299 F. 832, 834.

Seventh. Because the decision of the Court below that the petitioners were not entitled to have a Bill of Exceptions under Rule 7 of the rules promulgated by the Supreme Court in criminal cases from the District Court to the Circuit Court of Appeals is erroneous, and is in conflict with the decision rendered in the case of *Boynken vs. Huff*, 121 Fed. (2d) 865, decided by the United States

Circuit Court of Appeals of D. C., and is in conflict with the decision of the Supreme Court in *Ray vs. U. S.*, 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976, and in the case of *Forte vs. U. S.*, 302 U. S. 223, 58 S. Ct. 180, 82 L. ed. 209.

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PRAYER

Wherefore your petitioners, and each of them, pray that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered on its Docket No. 12531, Criminal, and entitled Hans Pete Mortensen and Lorraine Mortensen, Petitioners, vs. The United States of America, Respondent, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment herein of said Circuit Court may be stayed and petitioners released on bail during the pendency of this appeal, and that the judgment herein may be reversed by this Court and for such other and further relief as to this Court may seem proper.

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